IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

v.

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Middle District of Florida is reported as *Greene v. Massey*, 546 F.2d 51 (5th Cir. 1977), and is contained in the appendix. The order of the District Court dismissing the petition for writ of habeas corpus is unreported but is contained in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1977. The petition for a writ of certiorari was filed on April 23, 1977, and granted on June 20, 1977. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution did not bar retrial of Defendant for first degree murder after the Florida Supreme Court found that the evidence was insufficient to prove the commission of that offense?

STATEMENT OF THE CASE

Petitioner, Richard Austin Greene, along with Joseph Manuel Sosa, was found guilty in a Florida state jury trial in 1965 of murder in the first degree. During that proceeding, counsel for Petitioner made a motion for a directed verdict of acquittal and a motion for new trial. Both were denied. Petitioner received the death penalty.

On November 5, 1968, the Florida Supreme Court reversed the conviction. In a per curiam decision, the Florida Supreme Court concluded that:

> [A]fter a careful review of the voluminous evidence here we are of the opinion that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So.2d 736, 737 (Fla. 1968).

On remand from the Florida Supreme Court's reversal, Petitioner obtained a transfer of venue for his retrial to the Circuit Court of Orange County, Florida. Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the State trial court and, upon appeal of the denial, the appellate court affirmed. *Sosa v. Maxwell*, 234 So.2d 690 (2d DCA Fla. 1970).

Upon retrial, Petitioner was again convicted of first degree murder, but with a recommendation for mercy. Petitioner was sentenced to life imprisonment which he has been serving continuously to date.

Petitioner appealed to the Fourth District Court of Appeal of Florida on the ground that his retrial for the same offense after the Florida Supreme Court had found the evidence at his first trial insufficient to establish his guilt beyond a reasonable doubt placed him in double jeopardy. The Fourth District Court of Appeal affirmed his conviction. *Sosa and Greene v. State*, 302 So.2d 202 (4th DCA Fla. 1974). A petition for a writ of certiorari reiterating the double jeopardy claim was denied by the United States Supreme Court. *Greene v. Florida*, 421 U.S. 932 (1975).

Thereafter, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, urging that the Double Jeopardy Clause bars retrial once a conviction for the same offense is reversed because the trial court erred in not granting acquittal due to insufficient evidence. In its February 1976 order, the District Court intimated that absent prior precedent in the Fifth Circuit it might have granted Petitioner's request. However, constrained by precedent of Fifth Circuit opinions, the District Court denied the writ.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §2253. The denial of the writ was affirmed because in addition to his motion for acquittal Petitioner had moved for a new trial. *Greene v. Massey*, 546 F.2d 51 (5th Cir. 1977). The Circuit Court further based its finding that retrial was proper in this case on its interpretation that the federal circuit courts have the power to reverse for retrial in such cases pursuant to 28 U.S.C. §2106 and the Florida Supreme Court has similar power of review.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION DID NOT BAR RE-TRIAL OF DEFENDANT FOR FIRST DEGREE MURDER AFTER THE FLORIDA SUPREME COURT FOUND THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE THE COMMISSION OF THAT OFFENSE.

Petitioner, Richard Austin Greene, in 1965, was convicted of first degree murder. On appeal, the Florida Supreme Court overturned that conviction upon its finding that the State had presented insufficient evidence to establish defendant's guilt beyond a reasonable doubt. *Sosa v. State,* 215 So.2d 736 (Fla. 1968). However, in its per curiam opinion, the court remanded for a new trial for the same offense, and it is this eventuality that gives rise to the double jeopardy claim. *Id.*

That Petitioner was entitled to an order of acquittal by the trial judge is stated in language that could not have plainer meaning:

> After a careful review of the voluminous evidence here we are of a view that the evidence was *definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder* in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Id. at 737 (Emphasis added).

When the Florida Supreme Court held the evidence to be insufficient to convict, as a matter of law, it established that the trial court erred in failing to acquit. If the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would have prevented a new trial for the same offense. There should be no difference when an appellate court, correcting the injustice by ruling as the trial judge should have ruled, reverses a conviction for lack of evidence.

Sapir v. United States, 348 U.S. 373, 374 (1955) (per curiam) (Douglas, J., concurring).

Having decided that the evidence is insufficient to convict, an appellate court cannot remand for a new trial under the rationale that justice is thereby served without violating the plain justice that logic and the Double Jeopardy Clause demand. Mere citation of a rule of procedure or statute will not justify retrial when the United States Constitution is thereby contravened. However, the court below reasoned that the decisions of the Supreme Court establish that the federal circuit courts have the power under 28 U.S.C. §2106 to remand for a new trial after finding that the evidence is insufficient to convict. *Greene v. Massey*, 546 F.2d 51, 55 (5th Cir. 1977) (Appendix). The Court further reasoned that under §924.32, Florida Statutes (1967), The Florida Supreme Court had similar power to remand Petitioner's case for retrial. *Id.* at 56 (Appendix).

A defendant who obtains from the trial judge the directed verdict of acquittal to which he is entitled because of insufficient evidence cannot be retried for the same offense. *Green v. United States*, 355 U.S. 184 (1957). It is incongruous and illogical that a defendant who obtains from an appellate court a reversal of his conviction due to insufficient evidence to convict can be retried. The reason for reversal is identical to the reason for the directed verdict: the prosecution failed to present sufficient evidence to prove the crime charged. What this amounts to is that when a trial court errs in not granting an acquittal the defendant can be subjected to retrial. How can the error of a trial judge vitiate the application of the Double Jeopardy Clause thus penalizing the defendant for the Court's error?

The Court below reasons that the result must differ when a defendant moves for a new trial as opposed to when he merely appeals the trial court's failure to direct acquittal. *Id.* at 55. In the former instance he can be retried. In the latter, he cannot. This is an illogical distinction as well, since in both instances the trial judge erred in not acquitting. The logical

remedy is acquittal, not retrial. Admittedly, the law heretofore enunciated by the Supreme Court has contributed to the uncertainty in applying the Double Jeopardy Clause *See, e.g., United States v. Bass*, 490 F.2d 846 (5th Cir. 1974).

The Supreme Court first encountered the question of the permissibility of remanding for a new trial after a reversal for insufficient evidence in *Bryan v. United States*, 338 U.S. 552 (1950). After extensive discussion of the statutory power of the Courts of Appeals the defendant's contention that a retrial would violate the Double Jeopardy Clause was viewed thusly:

> He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal . . . [W]here the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *Francis v. Resweber*, 329 U.S. 459, 462 (1947). *See, Trono v. United States*, 199 U.S. 521, 533-534.
>
> 338 U.S. 552, 560.

The Court, however, did not seem to perceive the new issue of double jeopardy. The quote from *Francis v. Resweber*, 329 U.S. 459, 462 (1947) was dictum, and that case relied on *United States v. Ball*, 163 U.S. 662 (1895) which concerned a defective indictment not insufficient evidence. Not until *Sapir v. United States*, 348 U.S. 373 (1955) was the issue of reversal for insufficient evidence delineated from reversal for other error infecting a trial, and since that case the Court has yet to directly face the issue presented herein. The holding in *Bryan v. United States*, 338 U.S. 552 (1950), then, cannot be said to be controlling on the issues here presented for review.

In *Sapir v. United States*, 348 U.S. 373 (1955), the defendant had appealed from a conviction of conspiracy to defraud the United States. He had moved for a judgment of acquittal but the District Court denied the motion. On appeal the Court of Appeals held that the motion should have been granted since the evidence was insufficient to convict, and it remanded with instructions to dismiss. 216 F.2d 722 (10th Cir. 1954). Upon the government's motion for rehearing based

on newly discovered evidence a new trial was granted. In a per curiam opinion the Supreme Court reinstated the first judgment. 348 U.S. 373. The Court did not directly face the double jeopardy issue saying merely that the first judgment directing acquittal was the correct one. *Id.*

Concurring in *Sapir*, Mr. Justice Douglas addressed the constitutional question. He argued that a new trial after an acquittal by an appellate court for insufficient evidence was no different from an acquittal by a trial court, and that a new trial was in either case prohibited by the Double Jeopardy Clause of the Fifth Amendment. 348 U.S. at 374. He stated:

> If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.

Id. It is noteworthy that Sapir had not alleged other errors and had made no motion for a new trial. Had those factors been present, however, it was not certain that the case would have been decided differently. Mr. Justice Douglas indicated without explanation that when a new trial is asked for then new considerations come into play, and the whole record is opened up for such disposition as is just. *Id.*, citing *Bryan v. United States*, 338 U.S. 552 (1950). And see *Trono v. United States*, 199 U.S. 521 (1905); *Stroud v. United States*, 251 U.S. 15, 18 (1919); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). Reversal on grounds of error that infected the trial would also be different. *Id.* citing *Palko v. Connecticut*, 302 U.S. 319 (1937). An acquittal on the basis of lack of evidence, however, concludes the controversy. *Id.*

Except for Mr. Justice Douglas' assertion that an acquittal for lack of evidence concludes the controversy, none of his other pronouncements concerning the effect of reversal for error or the effect when there is a motion for a new trial were material to the case. It was not ascertainable whether his rationale was wholly that of the majority.

In *Forman v. United States*, 361 U.S. 427 (1960), it appears that Mr. Justice Douglas' opinion in Sapir was representative of the views of a majority of the Court. In that case the defendant had appealed his conviction seeking a new trial. The Court of Appeals first reversed his conviction and remanded for an acquittal due to an erroneous instruction by the trial court. The defendant's request for a new trial, however, had not been on grounds of insufficient evidence. On rehearing, the Court of Appeals remanded for a new trial. The Supreme Court held that a new trial would not violate the Double Jeopardy Clause.

Again, however, as in *Sapir*, the issue of double jeopardy presented in the case sub judice was absent. In fact, no issue of double jeopardy underlay the Court's holding in *Forman*. There was ample evidence to convict. *Id.* at 426.

In comparison, the Court reinforced the opinion of Mr. Justice Douglas, rendered in *Sapir*, that an acquittal by an appellate court was entitled to the same weight as an acquittal by a trial court, at least where there was no request for a new trial. Even so, the Court seemed to express that if a new trial was requested, then the whole record is opened up for whatever relief is just, even if it is beyond the relief sought. *Id.* at 425. The logic of such an analysis is not apparent.

Again, Petitioner emphasizes that in *Sapir* no request for a new trial was made nor error alleged except that of failure to acquit. In *Forman*, the evidence was sufficient and the case turned instead on trial error. Therefore, this Court has yet to face the issue of whether retrial is proper under double jeopardy principles when a defendant has moved for a new trial and upon appeal an appellate court finds that the evidence at trial was insufficient to convict. All pronouncements on that point have been rendered as dictum.

Petitioner acknowledges the myriad decisions of the federal courts of appeal which have reversed and remanded for a new trial after a finding of insufficient evidence to convict. E.g., *United States v. Burks*, 547 F.2d 968 (6th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3806 (U.S. June 13, 1977) (No.

76-6528), *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974), *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973), *Melton v. United States*, 398 F.2d 321 (10th Cir. 1968). Nevertheless, federal courts have recognized that retrial can be fundamentally unfair and acquittal has either been ordered or else the trial court was directed to consider the question of fairness. E.g. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), *United States v. Ramirez*, 428 F.2d 807 (2d Cir. 1973), *Watkins v. United States*, 409 F.2d 1382 (5th Cir. 1969). Although *Forman v. United States*, 348 U.S. 373 (1955) was not a case in which reversal was based upon insufficient evidence, still it is often cited for the proposition that if a defendant asks for a new trial then it is not unjust to grant a new trial even if a verdict of acquittal should have been granted at trial. E.g., *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973). This is fundamentally unfair, is a violation of the double jeopardy clause and it asserts an illogical proposition. A scholarly discussion of these points can also be found by examining *United States v. Wiley*, 517 F.2d 1212 (D.C. Cir. 1975).

In *Wiley*, the Court of Appeals for the District of Columbia noted that neither the idea that courts should utilize a balancing test between fairness to the defendant and to the government, nor the idea that a defendant, by asking for a new trial, waives the issue of double jeopardy, provides a sound basis for subjecting to retrial one who is wrongfully denied a judgment of acquittal at trial. *Id.* at 1215-1217. The Court also noted the confusion caused by the Supreme Court's decisions in *Bryan, Sapir* and *Forman. Id.* at 1216 n.22. Regardless of the inconclusive nature of the law as a result of *Bryan, Sapir* and *Forman* and in spite of the arguments that it acknowledged to be persuasive as to what the law justly should be, the court chose not to decide the case on the issue of double jeopardy but presumed that double jeopardy was not present. *Id.* at 1217-1218. Rather, the court chose to exercise its power to dispose of appeals in the interest of justice under 28 U.S.C. §2106 and found that retrial would not be just. *Id.* at 1218-1223.

Among the many state courts which have been confronted with the issue at bar there has been a growing recognition that retrial after an appellate finding of insufficient evidence constitutes double jeopardy. *State v. Torres*, 510 P.2d 737 (Ariz. 1973); *Hervey v. People*, 495 P.2d 204 (Colo. 1972); *People v. Brown*, 241 N.E.2d 653 (1st Dist. Ct. App. Ill. 1968). (A compelling discussion of the reasoning asserted by Petitioner, herein.); *State v. Alston*, 216 S.E.2d 416 (Ct. App. N.C. 1975). (An incisive discussion of the differences between reversal for error and the need for differing treatment under double jeopardy principles, including well-reasoned commentary on the controlling United States Supreme Court cases.); *State v. Moreno*, 364 P.2d 594, 595 (N.M. 1961).

These state court decisions confront the conflict posed by the comparison of the opinions in *Bryan v. United States*, 338 U.S. 552 (1950); *Sapir v. United States*, 348 U.S. 373 (1955), and *Forman v. United States*, 361 U.S. 416 (1960). "Since the defendant's motion for judgment of acquittal . . . should have been granted, a new trial . . . would be contrary to the Fifth Amendment guarantee against double jeopardy." *Hervey v. People*, 495 P.2d 204, 208 (Colo. 1972), citing 348 U.S. 373.

> If [a defendant's] double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should take effect only if the reversal is granted for the reasons contained in the new trial request, and if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for new trial would never become operative.

People v. Brown, 241 N.W.2d 653, 661 (1st Dist. Ct. App. Ill. 1968). (In resolution of the apparent conflict among *Bryan, Sapir* and *Forman.*) *Accord. State v. Alston*, 216 S.E.2d 416, 418 (Ct. App. N.C. 1975). These State court decisions have recognized the fundamental difference between reversals for error when the lower court fails to grant an acquittal because of insufficient evidence and reversals for other trial error, and that justice requires the application of different appellate remedies in each case.

Reversals because of insufficient evidence and reversals for other trial error should be treated differently. Their difference suggests that a separate remedy is required, not only under constitutional standards but in the interest of logical continuity which must support any perception of justice in our system of laws. Failing to utilize logical consistency forces our courts to rely on cliches, catchwords, and legal fictions to avoid direct confrontation with what logic indicates should be the correct rule of law. Similarly, a court may be constrained in following the logical path to justice in its fear of releasing a possibly dangerous person. Petitioner posits that this fear is demonstrably ill-founded.

The distinguishing factor between the two categories of error under consideration is the relationship between the kind of error and the burden of proof needed to convict in any criminal trial. Guilt of a criminal charge must be established by proof beyond a reasonable doubt, and this is a requirement of due process applicable to the states. *In re Winship*, 397 U.S. 358 (1970). Many may fear that releasing a defendant after a finding of reversible error would be a failure to protect society from crime since the error may bear little relationship to whether the prosecution has made out a *prima facie* case. This is true since the jury's determination that the defendant is guilty probably means that the prosecution has met the burden of proof despite the error. To release such a defendant would impair the function of the criminal law. In these cases the defendant is not entitled to acquittal at trial. He is entitled to one fair trial, and if error mars his trial retrial seems appropriate since the evidence was sufficient to go to the jury.

However, when a judge sees that his duty is to reverse for insufficient evidence he should not object to an acquittal, especially since his finding indicates that he would have voted for acquittal himself. To release such a defendant is not the release of a dangerous person. The man is not guilty of the crime charged. Society, through the courts, should not fear releasing such a defendant any more than it fears a jury acquittal.

No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression, harrassment, and possibility of convicting even the innocent who are subjected to multiple trials, all of which the double jeopardy clause was meant to prevent, is clearly present in a new trial following a reversal for insufficient evidence. *See, Green v. United States,* 355 U.S. 184, 187-188 (1957). In the insufficient evidence case remanded for retrial, the appellate court is in essence saying, "Well, the prosecution failed to prove you guilty this time but they can have another chance." This, Petitioner urges, violates his right not to be put twice in jeopardy for the same offense.

Can it be logically said that the grant of a retrial for insufficiency of the evidence can be justified "in the interest of justice"? The answer is a clear "No!". In such cases the prosecution failed in its duty to sustain its burden of presenting proof sufficient to convict. The judge committed error in not directing acquittal and the defendant failed to have the verdict he was entitled to at trial as a matter of law. A new trial, while ostensibly granted in the interest of justice, merely exacerbates the injustice done by the failings of the prosecutor and trial judge. It makes a mockery of the concept of fundamental fairness and the idea of due process to grant a new trial in such cases by citing that it is in the interest of justice. Justice has already failed the defendant at trial and it fails him again when he faces the jeopardy of a new trial to correct errors of judicial officers.

Cases permitting a new trial after reversal for error have reasoned that the defendant waives his double jeopardy protection by appealing. E.g., *United States v. Ball,* 163 U.S. 662 (1896), *Bryan v. United States,* 338 U.S. 552 (1950); but see, *Green v. United States,* 355 U.S. 184 (1957). "A defendant's attempt to obtain from an appellate court the acquittal which should have been entered by the trial judge cannot fairly or logically be deemed a relinquishment of double jeopardy protection or a consent to retrial." *United States v. Wiley,* 517 F.2d 1212, 1216 (1975). A request for a

trial free from prejudicial error, as distinguished from lack of evidence, however, can be reasonably argued as consistent with double jeopardy principles. *Id.* at 1216. In any case, the relief commensurate with a finding of insufficient evidence is, logically, acquittal not retrial. *Id.* at 1216.

Further, the Supreme Court has stated:

> "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of *voluntary knowing relinquishment of a right.*

Green v. United States, 355 U.S. 184, 191 (1957) (emphasis added). In that case, the defendant had been charged with first degree murder, but was convicted of second degree murder. He appealed. On remand he was again tried for first degree murder, against his protest that this was double jeopardy, and he was convicted for that offense. On appeal, the conviction was affirmed. Green petitioned the Supreme Court for a writ of certiorari on the ground that he had been twice in jeopardy for the same offense.

The government argued that Green waived his claim of double jeopardy by appealing. The government's position left Green the choice of appealing and being subjected to retrial of an offense for which he had been impliedly acquitted, or he could accept the conviction of second degree murder. This, the Supreme Court held, was not a meaningful choice. The Court recited:

> Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

Id., citing Kepner v. United States, 194 U.S. 100 at 135 (1904).

Under any theory which subjects a person to retrial after reversal for lack of evidence, whenever a defendant asks for a new trial based upon other error he is effectively forced to

surrender one right to obtain another. *Compare Bryan v. United States,* 338 U.S. 552 (1950), with *Sapir v. United States,* 348 U.S. 373 (1955), and *Forman v. United States,* 361 U.S. 427 (1960). If a defendant merely alleges that the trial court erred in not directing an acquittal based upon insufficient evidence, and nothing more then the appellate court may not grant a new trial. *Sapir v. United States,* 348 U.S. 373 (1955); *Forman v. United States,* 361 U.S. 427 (1960). To protect his claim under the Double Jeopardy Clause the defendant would be forced to give up his claim of error on grounds other than lack of evidence. He has no assurance that the appellate court will agree that the evidence is insufficient. To condition the assertion of his right to acquittal on giving up his right to claim other error cannot be justified under the Constitution.

It now appears that the controlling factor in double jeopardy cases not involving mistrial is whether the appellate determination would subject the appellant to "a second trial before a second trier of fact". *United States v. Wilson,* 420 U.S. 332 (1975). The Court stated, ". . . [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." 420 U.S. at 344. It would appear that the same reasoning should apply when, on appeal, it is found that there is insufficient evidence: successive prosecutions offend the Double Jeopardy Clause.

In *Wilson,* a jury verdict of guilty was rendered. The trial judge, however, directed a verdict of acquittal. The government appealed and the Court of Appeals reversed, reinstating the guilty verdict. The Double Jeopardy Clause was not offended since the Defendant would not be subject to multiple punishment or successive trials. *Id.*

Clearly, a defendant who is found guilty at trial based upon sufficient evidence has been in jeopardy. If trial error infected his trial he is entitled to seek a new trial. But, at no stage of the proceedings has there been a finding of acquittal, or entitlement thereto, so that double jeopardy principles would

be involved upon retrial. However, once the trial judge or the appellate courts determine that the defendant was entitled to acquittal it is illogical and unjust to retry him, especially in light of double jeopardy principles which unquestionably attach upon trial acquittal.

The key determinant, then, of whether the double jeopardy clause is implicated is whether a defendant will be subjected to multiple trials for the same offense. *United States v. Wilson*, 420 U.S. 332 (1975). *Green v. United States*, 335 U.S. 184 (1957). In the case at bar, Petitioner has been subjected to multiple trials and this is inconsistent with the requirements of *Wilson*. *See, also, United States v. Jenkins*, 420 U.S. 358 (1975).

In fact, the opinion of the Court below leads to a situation in which retrial for the same offense can go on endlessly as long as the defendant moves for a new trial on error other than failure to acquit. And according to the Court below even if there is no other error than that the evidence is insufficient, the state may retry such a defendant. This is clearly inconsistent with double jeopardy principles.

The justification for retrial is lacking when reversal is for lack of evidence. The appellate court in such cases is specifically holding that the prosecution has failed to meet the burden of proof and that the defendant was entitled to acquittal at trial. It is clear that situations which afford the prosecution a second chance to strengthen its case but, yet, deny the defendant the finality of his entitlement to an acquittal are violative of the double jeopardy clause. *See, United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Wilson*, 420 U.S. 355, 343 (1975).

Therefore, Petitioner urges that the Court of Appeals erred in finding that Petitioner's request for a new trial permitted his retrial since any reading of *Bryan*, *Sapir*, and *Forman* suggests that the logical consequence of an appellate finding that there was insufficient evidence to convict should be no different from a directed verdict of acquittal at trial: in either case the double jeopardy clause bars retrial of a defendant for the same offense.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded with directions that Petitioner's conviction for first degree murder be overturned.

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